Petition

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-1823

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

MAECOM S.A., GENEVA; COOK INTERNATIONAL (NEDERLAND) N.V.; and COOK INDUSTRIES, INC.,

Petitioners,

against

ANGLOMAR BULKCARRIERS, LTD.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented

Were the Courts below correct in denying the effect of the U.S. Clause Paramount in the charter party which incorporated, inter alia, the one year Statute of Limitations in the Carriage of Goods by Sea Act, 46 U.S.C. §1300 *et seq.*?

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PETITION FOR A WRIT OF CERTIORARI

Jurisdiction

The judgment of the Court of Appeals was entered on January 28, 1982. This petition was filed within 90 days of that date. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §1254 (1).

Statement of the Case

Respondent's suit in Admiralty against the petitioners in the District Court was for indemnification for a settlement paid by the former to various cargo receivers in Antwerp, Belgium. The Petitioners[1] were sellers of a shipment of soya beans to these cargo receivers and were also the voyage charterers of the vessel *Hampton Lion* which was manned and owned by the Respondent, Anglomar Bulkcarriers, Ltd., (hereinafter Anglomar).

The shipment of soya beans arrived in a damaged condition at Antwerp, Belgium. Several months later on or about May 8, 1974, the cargo receivers started suit against the Respondent in Antwerp, Belgium.[2] On December 5, 1977, approximately forty-four months later, the Respondent sent to Petitioner, Maecom, a telex informing the latter of the existence of the cargo receiver's suit in Antwerp. The telex also invited the Respondent, Maecom, to assume the defense of the Antwerp action. Simultaneous with the sending of this telex Respondent filed its complaint for indemnity in the District Court. This Complaint (*See* Appendix, at 13a-17a, inclusive) sought recovery from the Petitioners, in the form of indemnity, for any judgment against or settlement by the Respondent for the damages which accrued to the cargo re-

[1]Maecom S.A., Geneva; Cook International (Nederland) N.V.; and Cook Industries. The other named defendants did not appear in the action.

[2]The damaged beans were also the subject of an earlier arbitration in London pursuant to the contract of sale. Neither the arbitration nor the award rendered are the subject of the present Petition.

ceivers as a result of the soya beans' arrival in a damaged condition. Although Respondent's complaint asserted three causes of action, viz. breach of contract, breach of implied warranty and common law active negligence, the essence of their lawsuit was that Petitioner, Maecom, had failed in its obligation(s) under the charter party thought to govern the relationship between the parties.

The aforementioned charter party (*See* Appendix, at 17a) was made subject to the Carriage of Goods by Sea Act (COGSA) 1936, 46 U.S.C. §1300 *et seq.* by reason of Clause 24 incorporating the "U.S. Clause Paramount", which states:

> "U.S. CLAUSE PARAMOUNT:
>
> This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or indemnities or an increase of any of its responsibilities or liabilities under said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

The United States Carriage of Goods by Sea Act, 46 U.S.C. §1303 (6), provides in relevant part:

> "In any event the carrier and the ship shall be discharged from all liability in respect of or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: [Provided], That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered."

Respondent specifically pleaded this charter party as the sole basis for Petitioner's asserted liability to the Respondent for dam-

ages incurred by the latter in the event of a finding that it was liable to the Antwerp claimant.

The Antwerp litigation was timely instituted against by the Cargo Receivers against the Respondent on May 8, 1974. Since the subject shipment was discharged in August, 1973, Anglomar's action against the defendants herein for indemnity could have been timely only if started in or before August, 1974. The present action was instituted (filed) in December, 1977, over three years after this expiration date. The plaintiff's present action should have been time barred had the charter party been permitted by the Courts below to govern the conduct of the parties thereto.

Congress specifically excluded Charter-Parties from the *ex proprio vigore* application of COGSA ". . . because it has generally considered the bargaining power of charterers and vessel owners to be merely equal, unlike the edge in bargaining power held by vessel owners and charterers over cargo owners." *Nissho-Iwai* v. *M/T STOLT LION*, 617 F.2d 907 at pp. 913-914 (n.7) (2nd Cir. N.Y. 1980).

The decisions of the Courts below denied to the Petitioners and Respondent the power to contract, at arms length, *inter se*, which power was specifically granted by the Congress.

Reason for Granting Writ

The inability of the parties to a charter-party to predict, within the various Circuits, whether their ability to contract *inter se* regarding a time for suit, is intact or has been eroded by judicial decree, makes this issue appropriate for this Court's review. The enforceability of the one year time for suit provision in charter party situations where indemnity is sought finds support in *Grace Lines, Inc.* v. *Central Gulf S.S. Corp.*, 416 F.2d 977 (5th Cir. 1969) and *Hercules, Inc.* v. *Stevens Ship Co.*, 629 F.2d 418 (5th Cir. 1980) (case to be reheard by the Court en banc. No date for oral arguments has been fixed.) The provision has been held unenforceable in *St. Paul Fire & Marine Insurance Co.* v. *United States Lines*, 258 F.2d 374 (2nd Cir. 1958); *Francosteel Cor-*

poration v. *SS TIEN CHEUNG*, 375 F. Supp. 794, 796 (S.D. N.Y. 1973); and, of course, the decision of the Court below.

The need for clarification of the rights of signatories to a charter-party is evidenced by the wording of the decision below. The District Court was permitted only two options with the facts before it, viz. accept the clear wording of the charter-party and to rule that the plaintiff's action was time-barred; or to go off the charter-party and rely upon some other theory. When the Court chose the latter course, anomalous results followed.

Preliminarily, it should be noted that the District Court did not hold that any specific language of the charter-party was inapplicable. Rather, it was held, somewhat obliquely, that cases cited in support of the charter-party were distinguishable.

It is clear that the District Court chose not to meet the issue head on. The matter, the Court held, was to be decided under the rules of common law indemnification in support of which the Court cited Count III of plaintiff's complaint and *Prudential Lines* v. *General Tire International Co.*, 440 F. Supp. 556 (S.D. N.Y. 1977). Hence, the anomaly. Such a holding, for which no separate predicate for federal jurisdiction exists, is contrary to the same plaintiff's complaint which pleaded the subject matter as ". . . an admiralty and maritime claim within the meaning of Rule 9(h) of the Rules of Civil Procedure for the United States District Court." (*See* Appendix, at 13a).

Undoubtedly, plaintiff envisioned the charter-party as the basis for this ". . . admiralty and maritime claim" for it was pleaded as the basis of all three of plaintiff's causes of action. Thus, when the District Court held that principles of common law indemnity governed the parties, it held, in effect, that defendants had "actively" violated some standard of care owed to the cargo receivers for which the plaintiff was exposed to liability. Left unsaid, however, was that this duty owed by the defendant could only have been defined by the terms of the charter-party. But the implication of the Court's decision was that common law indemnity is somehow different and apart from the charter-party, the former

having a period of limitations which runs from the time of payment by the indemnitee, the latter a period of limitations (one year) computed from the date of delivery of goods or when goods should have been delivered. The District Court failed, therefore, to detect the fault in the plaintiff's pleading.

The Court also erred when, in furtherance of its "common law indemnity" theory, cited *Prudential, etc.*, (*supra*). Judge MacMahon, however in that case, specifically held: [at p. 559]

> "*Grace Lines* and the instant case are distinguishable. The indemnity action in Grace Lines was based upon a charter party which itself incorporated the COGSA statute of limitations. *Thus, both the cargo action and the indemnity action had to be brought within one year of the delivery of the goods.*" [emphasis added]

It can be conjectured that the District Court in its memorandum had some larger view in mind that would not have been served by giving the terms of the charter-party a strict construction. Several cases have pointed to a *potential* abuse which might arise if the one year statute of limitations provision were enforced. For example:

> "In any event, the court finds the COGSA period of limitations inapplicable to suits for indemnity. The application of this statute of an indemnification claim would thwart the purpose of Rule 14 of the Federal Rules of Civil Procedure, as well as, the modern trend of authority. Any other conclusion would sanction a plaintiff to selectively sue an isolated defendant, and, by skillful manipulation of the limitations period, allow him to deny that defendant any claim for indemnity against a third-party defendant who may be subject to liability over. (For example, plaintiff brings suit one day before it is time-barred.)" *Francosteel Corp.* v. *SS TIEN CHEUNG,* 375 F. Supp. 794, at 796 (S.D.N.Y. 1973).

Such a rule safeguarding the rights of an indemnitee is particularly pungent to the present Petitioners who were not sued

until forty-four months after the action against the Respondent was started. The inapplicability of the District Court's reasoning to the present case, thus demonstrated, incombination with the conflict within the circuits concerning a charter-party provision affecting a large segment of the commercial community, warrant this Court's issuance of its Writ of Certiorari.

Conclusion

In the event of the Writ being issued, the Court will also be asked to consider Petitioners' contentions that:

1) The finding of the District Court that the Antwerp action against the Respondent was settled in January, 1978, was clearly erroneous.

2) The Respondent did not shoulder its burden of proof in the Court below in that it failed to demonstrate:

a) Actual liability to the Antwerp claimants; and

b) the reasonableness of its settlement with the Antwerp claimant; and

c) lack of prejudice to the Petitioners as indemnitor by reason of the Respondent's failure, as indemnitee, either to inform the former of the latter's settlement negotiations or to tender to Petitioners the defense of the Antwerp action before it was settled.

Respectfully submitted,

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Appendix

APPENDIX

Order of the Court of Appeals

UNITED STATES COURT OF APPEARS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of January one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE ELLSWORTH VAN GRAAFEILAND,
HONORABLE LAWRENCE W. PIERCE,
Circuit Judges,

81-7632/7662

ANGLOMAR BULKCARRIERS, LTD.

Plaintiff-Appellant-Cross-Appellee,

against

MAECOM S.A., GENEVA; COOK INTERNATIONAL (NEDERLAND) N.V.; and COOK INDUSTRIES, INC.,

Defendants-Appellees-Cross-Appellants.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record

from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Anglomar's assignment claim, although not pleaded, may be treated as if it were raised in the pleadings if it had been tried by "express or implied consent of the parties," or if the pleadings should have been amended to conform with the evidence introduced at trial. Fed. R. Civ. P. 15(b). Since Anglomar's putative assignment claim was submerged in its indemnification claim, Maecom and Cook could not have consented to try it. Neither Anglomar's allusions to assignment in its opening argument and in its Proposed Conclusions of Law, nor the admission into evidence of a receipt assigning the receiver's claims to Anglomar support a finding of consent by Maecom and Cook. Moreover, since all of the evidence in the Belgian action conformed to Anglomar's indemnity claim, there was no justification for amending the pleadings to conform to the evidence. Accordingly, Judge Stewart acted within his discretion in declining to reach the claim.
2. In all other respects, we affirm for the reasons stated in Judge Stewart's thorough opinion.

IRVING R. KAUFMAN,
ELLSWORTH VAN GRAAFEILAND,
LAWRENCE W. PIERCE,
Circuit Judges

Judgment entered 1/28/82
RAYMOND F. BURGHARDT
Clerk

A True Copy
A. DANIEL FUSARO, Clerk
By FRANCIS T. GINDHART
Chief Deputy Clerk

Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGLOMAR BULKCARRIERS, LTD.,

Plaintiff,

against

MAECOM S.A., GENEVA; COOK INTERNATIONAL (NEDERLAND) N.V.; *et al.*,

Defendants.

MEMORANDUM DECISION

STEWART, District Judge:

Plaintiff, a British corporation, was in 1973 the owner of the M/V Hampton Lion. Defendant Cook Industries, Inc. ("Cook"), a Tennessee corporation, at that time was engaged among other things in the purchase and sale of grain commodities. Its wholly-owned subsidiary, defendant Maecom S.A., is a Swiss corporation. The remaining defendant, Cook International N.V., is a Netherlands corporation which is also wholly-owned by Cook.

Jurisdiction of the action is based on the admiralty and maritime jurisdiction of the court and the claim herein is within Rule 9 (h) of the Federal Rules of Civil Procedure.

On May 22, 1973, a charter party was entered into by plaintiff and Maecom which called for the carriage of 22,000 metric tons of soyabeans from Brazil to Belgium, the voyage to be made by the Hampton Lion. Defendant Cook guaranteed performance and due fulfillment of the charter party in accordance with its terms by letter of June 1, 1973.[1] The vessel was loaded during the period June 18, 1973-July 13, 1973 at Porto Alegre and Rio

[1]As a result, Cook is liable for the obligations of the other defendants in this action.

Grande, Brazil. She sailed on July 13, 1973 and arrived in Antwerp on or about August 8, 1973. The cargo was loaded in accordance with the terms and conditions the charter party, including a provision that the cargo was "to be loaded and trimmed by charterers' [Maecom's] stevedores free of risk and expense to the vessel."

The twenty-five various shippers each submitted negotiable bills of lading which were endorsed by the shippers to Maecom and which in turn endorsed them to the Belgium receivers of the soyabeans. The bills of lading incorporate the terms and conditions of the charter party. They also indicate defendant Cook International N.V. as the notify party.

The soyabeans had been purchased by two Belgian companies (Vandermoortele and Graines & Huiles) pursuant to contracts dated April 12 and April 16, 1973, between Maecom as seller and the Belgians as buyers. These contracts incorporated by reference the standard form contract number 22 of the Federation of Oils, Seeds and Fats Association ("FOFSA"). The soyabeans in question constituted the entire cargo of Hampton Lion on this voyage.

After the soyabeans arrived in Belgium, the receivers filed claims against Maecom as seller under the contracts of sale on the ground that the soyabeans were defective. Pursuant to the contracts, the receivers thereafter instituted arbitration proceedings in England. As required by FOFSA 22, English law applied to these proceedings. The arbitration was concluded by awards totalling approximately $113,000 issued in December 1973 in favor of the receivers against Maecom "for inferiority of quality and for condition."

In addition to the British arbitration proceeding, the receivers also instituted suit in Antwerp in May 1974 against Anglomar Bulkcarriers, plaintiff here, and the vessel Hampton Lion. On December 5, 1977, a notice of claim and tender of defense in this suit was made by plaintiff via telexes to defendants Maecom

and Cook International. On the same date, this action was filed by plaintiff. Cook International by letter of December 14, 1977 rejected the claim and tender. In January 1978, plaintiff Anglomar entered into an agreement with the receivers, plaintiffs, in the Belgian suit, whereby that action was settled on payment by Anglomar of approximately $150,000. The receivers also executed an assignment to Anglomar of all rights, claims and causes of action which they had against Maecom and Cook International.

In the action before us, plaintiff seeks to recover the amount paid in settlement of the Belgian suit and the expenses incurred in connection therewith.

According to the testimony of plaintiff's Belgian law expert, the claim of the receivers in the Belgian law suit was based on clean bills of lading, which were signed by the Master of Hampton Lion or his agents. Under Belgian law, accordingly, the owner of the vessel was liable for damage to the cargo and the receivers properly named Anglomar as a defendant. Moreover, the Belgian court would apply Belgian law in its determination of the claims made in the lawsuit.[2]

Surveyors appointed by the Belgian court concluded (Joint Exhibit II, pp. 41-45) that the damage to the cargo was caused in large part by the "insufficient maturity" or lack of ripeness and high moisture content of "a great part of the soyabeans as [the cargo] was presented for loading". This, coupled with the inadequate ventilation in a vessel with the characteristics of Hampton Lion led to "depreciation by fermentation" of portions of the cargo. The length of the voyage which included eighteen days waiting time at Rio Grande in Brazil also contributed to the damages, especially to that portion of the soyabeans which had been previously loaded at Porto Alegre. An additional element of damage was the fact that higher processing costs were incurred

[2]Defendants' expert on Belgian law did not disagree with plaintiff's expert as to these matters.

in separating the hulls from the soyabeans which resulted from "the heterogeneity of the humidity consequent to the insufficient maturity" of part of the cargo. With particular reference to the lack of adequate ventilation, the surveyors found that "the responsibility of the charterers becomes involved (they must know the characteristics and the possibilities of the hired vessel in relation to the cargo to be taken on board)".[3] (Joint Exhibit II, p. 44). Plaintiff's expert testified that the Belgian court "may reject the conclusions of the Court expert, but in the majority of the cases they will follow the opinion of the expert" (Tr. p. 60).

A surveyor appointed by underwriters for the vessel also found the damages resulted from "the condition of the soyabeans at the time of loading" and "the excess of moisture [which] was a consequence of the insufficient maturity of the beans".

With respect to the claim for indemnity, plaintiff has the burden of establishing that there was at least a reasonable likelihood or a potential for liability in the Belgian lawsuit. *Damanti* v. *A/S Inger*, 314 F.2d 395 (2d Cir. 1963); *Mathiesen* v. *Panama Canal Co.*, 551 F.2d 954 (5th Cir. 1977). Plaintiff's Belgian law expert testified that such a likelihood clearly existed, which defendants' expert did not dispute. Given the clean negotiable bills of lading signed by the master, the vessel owner could be liable to the receivers for the damage to the cargo. Since it appears that the damages resulted at least primarily because of the defective condition of some of the soyabeans upon loading, the selection by the sellers of a vessel with unsuitable ventilation characteristics and the sellers' responsibility for loading the cargo and scheduling the voyage, plaintiff's right to indemnification seems clear. *Nissho-Iwai Co. Ltd.* v. *M/T Stolt Lion*, 617 F.2d 907 (2d Cir. 1980).

Secondly, plaintiff must also show that the settlement was reasonable. Here the amount claimed with interest was more than

[3]Cook was on notice that "with the very substantial rainfall during and after harvesting the beans are substantially wetter than they should be, and Brasil is by far not fully equipped with enough driers" (Ex. 12).

six times the amount paid in settlement. Plaintiff's expert considered the settlement to be very favorable; the defendant's expert did not take issue with this opinion.

Defendants contend that plaintiff is not entitled to indemnification because they were not treated fairly in that they were not given timely notice of the suit and the settlement. They point to the fact that a representative of plaintiff agreed with the receivers on a settlement of $150,000 in mid-June 1977. Notice of the suit and tender of defense was made on December 5, 1977, the same day this action was filed. However, the settlement was not finalized until the written release was executed a month later on January 4, 1978 in exchange for payment of the agreed amount. Defendants had sufficient time to take whatever action they chose.

Defendants further claim that plaintiffs failed to raise appropriate defenses to the claim of the receivers. But Anglomar did in fact, according to the undisputed testimony of its expert, raise in defense that the receiver had already been compensated in the English arbitration, that the damage resulted from inherent vice of the goods when loaded and that the claim was excessive in amount. No other defenses were suggested by either of the experts.

As to the arbitration award, the arbitration proceeding was based, not on the bills of lading, but the contracts of sale. The awards were "for inferiority of quality and for condition". Defendants' English law expert testified that the arbitration proceeding under British law should have dealt with all items of damage, including in transit damage. The FOFSA 22 contract provides that the soyabeans are to be of "fair average quality" and, if on arrival, they do "not prove equal to the above warranties, by sea or otherwise damaged or out of condition", the sellers may be liable to the buyers. Thus, contend defendants, the arbitration awards were a complete defense to the Belgian lawsuit. However, that this is so is hardly clear from the record.

The awards state only that the lawyers are entitled to an allowance off the contract price "for inferiority of quality and for condition". The arbitrator appointed by defendants testified (Joint Exhibit I, pp. 14-15, see also pp. 8-9) that there was no claim made for "damaged" as contrasted with "sound" beans, that "damaged" beans would be those which had suffered some damage while being transported, that "damaged" beans would have had to be the subject of a separate arbitration, and that there was no question of an arbitrage claim for damage. Moreover, plaintiff's Belgian law expert stated that the Belgian court would not have been bound by the decision of the arbitrators in London "because the proceedings were not between the same parties, and perhaps even the object was not, the proceedings were not the same" (Tr. p. 52).

With respect to the defense of inherent vice, it is also hardly clear that this would have been a good defense in view of the substantial evidence that immature soyabeans were comingled with others and that this circumstance, coupled with the vessel's inadequate ventilation facilities, caused damage. Indeed the testimony of plaintiff's expert suggests that the carrier might have been liable under Belgian law on the bills of lading claim even if the entire cargo had suffered from an inherent vice, since the court would not look beyond the four corners of the bills of lading (Tr. p. 79).

Defendants also assert that plaintiff acted improperly in failing to implead defendants as third party defendants in the Belgian lawsuit. Both plaintiff's and defendants' Belgian law experts agree that the receivers could not have proceeded in that lawsuit directly against the defendants since the Belgian lawsuit was founded on the bills of lading. This being the case, the receivers could proceed only against the carrier indicated in the bills of lading and defendants under Belgian law would not be regarded as carriers. The experts apparently agree that plaintiff could have brought the defendants into the Belgian action by a third party proceeding based upon the charter party. More importantly, how-

ever according to defendants' Belgian law expert the defendants could have appeared voluntarily in the Belgian suit which of course they failed to do.

Under the circumstances, we see no basis for defendants' claim that plaintiff acted improperly or unfairly in failing to bring them into the Belgian suit as third party defendants. Defendants had the opportunity to participate in the lawsuit before the settlement was finalized, and forthwith declined, citing the arbitration award against the sellers who were also the charterers, and asserting that "we see no reason why an additional claim was lodged against owners". The defendants apparently chose to rest on the position, as they do here, that the award exonerated them from further liability to anyone. The telex notifying defendants of the Belgian suit and tendering the defense also advised defendants that this action for indemnification was being filed. Defendants were thus aware that such a claim would be made here when they rejected the tender of defense. If defendants do in fact have a claim over against the receivers, they can presumably assert it now. Such a claim, of course, would depend on whether the awards covered all elements of damage and, as indicated herein, the award apparently did not do so.

Defendants also contend that the action is time barred by Section 1303(6) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §1303(6), which provides for a one year statute of limitations for suits against the carrier for damage to the cargo. Defendants rely primarily upon *Grace Lines, Inc.* v. *Central Gulf S.S. Corp.*, 416 F.2d 977 (5th Cir. 1969), *cert. denied*, 398 U.S. 939 (1970). As Judge MacMahon pointed out in *Prudential Lines* v. *General Tire International Co.*, 440 F.Supp. 556 (S.D.N.Y. 1977), the contract of sale (as well as the charter party) in *Grace* incorporated COGSA. Thus, in *Grace* the "indemnity claim was based on the rights which cargo had against Grace, and since cargo's claim against Grace was time barred, Central's claim for indemnity was also barred" (440 F.Supp. at 559). Here, the contract of sale was a standard FOFSA 22

form of agreement which provides for resolution of disputes between the parties (defendants here and the Belgian receivers) by arbitration and contains no provision like that in COGSA. *Grace* seems, therefore, to be clearly distinguishable.[4]

In any event, plaintiff here is proceeding by way of common law indemnification in Count III of the complaint and, as held in *Prudential* and cases cited therein (440 F.Supp. at 558), the cause of action accrues "when the judgment or settlement has been paid." Plaintiff's action is therefore timely.

With respect to defendants' claim of laches, defendants received timely notice of the Belgian lawsuit. They have, moreover, shown no prejudice because of any delay. Although the records of the arbitrator who testified were destroyed by him at the end of 1974, there is no evidence as to the availability of records maintained by others. In any event, that arbitrator testified by oral interrogatories, and did not appear to have any difficulty with his recollection, especially as to the critical areas of the case.

Since plaintiff's claim that it is entitled to recover as assignee of the receiver was not pleaded, we do not reach it.

We conclude that plaintiff has established its right to indemnification for the amount paid in settlement of the Belgian lawsuit together with its expenses incurred in connection thereto. Plaintiff will submit a proposed form of judgment.

SO ORDERED.

SIGNED BY
CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, New York
July 1, 1981

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[4]Even if *Grace* were considered not to be distinguishable on the facts, we would not follow it. *See St. Paul Fire & Marine Ins. Co. v. United States Lines Co.*, 258 F.2d 374 (2d Cir. 1958), *cert. denied*, 359 U.S. 910 (1959).

Amendment to Opinion of the District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANGLOMAR BULKCARRIERS, LTD.,

Plaintiff,

against

MAECOM S.A., GENEVA; COOK INTERNATIONAL (NEDERLAND) N.V.; *et al.*,

Defendants.

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77 Civ. 5893 (CES)

AMENDMENT
MEMORANDA DECISION

STEWART, District Judge:

The attached page 7 is an amendment to our decision dated July 1, 1981.

SO ORDERED.

CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, New York
July 14, 1981

As to the arbitration award, the arbitration proceeding was based, not on the bills of lading, but the contracts of sale. The awards were "for inferiority of quality and for condition". Defendants' English law expert testified that the arbitration proceeding under British law should have dealt with all items of damage, including in transit damage. The FOFSA 22 contract provides that the soyabeans are to be of "fair average quality" and, if on arrival, they do "not prove equal to the above war-

ranties, by sea or otherwise damaged or out of condition", the sellers may be liable to the buyers. Thus, contend defendants, the arbitration awards were a complete defense to the Belgian lawsuit. However, that this is so is hardly clear from the record. The awards state only that the buyers are entitled to an allowance off the contract price "for inferiority of quality and for condition". The arbitrator appointed by defendants testified (Joint Exhibit I, pp. 14-15, see also pp. 8-9) that there was no claim made for "damaged" as contrasted with "sound" beans, that "damaged" beans would be those which had suffered some damage while being transported, that "damaged" beans would have had to be the subject of a separate arbitration, and that there was no question of an arbitrage claim for damage. Moreover, plaintiff's Belgian law expert stated that the Belgian court would not have been bound by the decision of the arbitrators in London "because the proceedings were not between the same

Complaint

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW COURT

ANGLOMAR BULKCARRIERS, LTD.

Plaintiff,

against

MAECOM S.A.,GENEVA; *et al.*,

Defendants.

Plaintiff, Anglomar Bulkcarriers, Ltd., by its attorneys, Haight, Gardner, Poor & Havens, complaining of the defendants, alleges upon information and belief as follows:

1. Jurisdiction of this cause is within the admiralty and maritime jurisdiction of this Honorable Court and this is an admiralty and maritime claim within the meaning of Rule 9(h) of the Rules of Civil Procedure for the United States District Courts.

2. Plaintiff is a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain, and, at all times hereinafter mentioned, was the owner of the m/v HAMPTON LION.

3. Upon information and belief, defendant Maecom S.A. is a corporation organized and existing under the laws of Switzerland and, at all times hereinafter mentioned, was the charterer of the m/v HAMPTON LION; defendant Cook International (Nederland) N.V. is a corporation organized and existing under the laws of the Netherlands with an office and place of business c/o Cook Industries Inc., 40 Rector Street, New York, New York; and the various remaining defendants are corporations organized and existing under the laws of various countries.

4. On or about the 22nd day of May, 1973, at New York, New York, a charter party in writing was entered into between the plaintiff and defendant Maecom S.A., Geneva which called for the Carriage of 22,000 metric tons, 5% more or less quantity at owner's option, of heavy grain and/or sorghums and/or soyabeans in bulk from one safe berth Porto Alegre completing one safe berth Rio Grande (Brazil) or at charterers' option ½ safe berths Rio Grande (Brazil) only to one safe berth, one safe port out of Amsterdam, Rotterdam or Antwerp. The voyage was to be made by the British flag m/v HAMPTON LION. A copy of the said charter party, marked as Exhibit A, is annexed hereto and made a part hereof with the same force and effect as if herein repeated and set forth at length.

5. Thereafter the m/v HAMPTON LION was delivered to the charterer and performed the voyage described in the charter party. Twenty-five different bills of lading were issued in connection with this carriage of goods and all of the bills of lading were on a short form containing the following clause:

> "All the terms and conditions as per charter party dated New York, New York, May 22, 1973, to be deemed incorporated in this bill of lading."

Clean bills of lading presented by the defendants were duly signed by and for the Master.

6. The HAMPTON LION arrived at the port of Antwerp, Belgium in August of 1973. Subsequently, several claims were made on behalf of the receivers of the cargo of soyabeans in bulk carried on board the vessel and a suit was filed in Antwerp by CM. GRAANHANDELSNATIE and N.V. VANDEMMORTELE to recover 28,132,397 Belgian francs for losses allegedly arising from damage to the soyabeans.

As and For a First Cause of Action

7. At all times mentioned herein, the defendants were bound by the provisions contained in the aforesaid charter party. By the

terms of this charter party, the responsibility for loading and trimming the cargo, as well as discharging the cargo, was that of the defendants.

8. Accordingly, the defendants herein were contractually obligated to properly and carefully ship, select, receive, care for, handle, load and trim, and discharge the cargo which is the subject matter of the claims against plaintiff.

9. It is alleged in the Antwerp suit that the cargo was not properly shipped, received, cared for, handled, loaded and trimmed, and discharged from the m/v HAMPTON LION.

10. If plaintiff herein is held liable for claims made on behalf of the Antwerp receivers of the cargo herein, the plaintiff shall be entitled to recover all such damages from defendants herein as a result of defendants' *breach of contract* to properly and carefully ship, select, receive, care for, handle, load and trim, and discharge the cargo carried on board the m/v HAMPTON LION pursuant to the aforementioned charter party.

AS AND FOR A SECOND CAUSE OF ACTION

11. In accordance with the contractual obligations under the charter party herein, the defendants impliedly warranted that they were to perform their responsibilities to properly and carefully receive, handle, care for, load and trim and discharge the cargo in a good and workmanlike manner.

12. Any damage complained of by the Antwerp receivers to the cargo was caused by and due to the defendants' breach of their *implied warranty* to perform their responsibilities under the charter party in a good and workmanlike manner.

AS AND FOR A THIRD CAUSE OF ACTION

13. If plaintiff herein is held liable for any claims made on behalf of the Antwerp receivers of the cargo carried on board the m/v HAMPTON LION pursuant to the aforementioned charter party, then defendants herein will be cast in damages

to the plaintiff because of the sole, primary, active and direct fault and negligence and want of care on the part of the defendants herein in receiving, handling, caring for, loading and trimming and discharging the cargo which is the subject matter of such claims and this suit.

14. By reason of the foregoing, defendants are primarily liable for any and all damages sustained by the plaintiff herein and said defendants are obligated to indemnify the plaintiff for any and all damages that may be imposed upon it by reasons of the occurrences which took place in the performance of the aforementioned charter party and for the costs incurred, including reasonable attorneys' fees already incurred and which may be incurred in defending any and all claims made on behalf of the receivers of the cargo.

WHEREFORE, plaintiff prays:

(1) That the defendants be ordered to pay all attorneys' fees and costs incurred by the plaintiff heretofore in defense of such claims as well as all such attorneys' fees and costs arising in the future in defense of such claims;

(2) That defendants be ordered to indemnify the plaintiff herein for any and all liability found on behalf of the plaintiff with respect to the claims made by the receivers of the aforesaid cargo;

(3) That plaintiff have such further and other relief as this Court deems just and proper.

Dated: New York, New York
December 5, 1977

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Plaintiff

By_____
A Member of the Firm
One State Street Plaza
New York, New York 10004

Excerpt from Exhibit A annexed to Complaint

U.S. CLAUSE PARAMOUNT: This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or indemnities or an increase of any of its responsibilities or liabilities under said Act. If any term of this Bill of Lading be repugnant to said Act to any extent, such term shall be void to that extent but no further.

Statement Pursuant to Rule 28.1

The following are subsidiaries of the Company. Other subsidiaries, both consolidated and unconsolidated, have been omitted as these unnamed subsidiaries, considered in the aggregate as a single subsidiary, would not constitute a significant subsidiary. At March 16, 1981, the Company owned 100% of the voting securities of each subsidiary listed. Intended companies are direct subsidiaries of the company under which they are intended.

Name	*State or Country of Incorporation*
Terminix International, Inc.	Tennessee
Cook • Treadwell & Harry, Inc.	Tennessee
Cook-Aero White, Inc.	Oregon
Cook-Aero Industrial, Inc.	Oregon
Cook-White Insurance, Inc.	Oregon
Cook-Broadus Anderson & Associates, Inc.	Tennessee
Centralia Insurance Agency Managers of Texas, Inc.	Texas
Centralia Insurance Group, Inc.	Tennessee
Centralia Insurance Managers. Inc.	Mississippi
Cook-Fox-Everett, Inc.	Mississippi
Cook • Treadwell & Harry of Maryland, Inc.	Maryland
Cook • Treadwell & Harry Insurance Agency, Inc.	Virginia
Cook-Siegfried Insurance Agency, Inc.	Oklahoma
Columbia River Terminal Company	Delaware
Cook Export Corporation	Delaware
Cook Transportation System, Inc.	Delaware
Maecom, S.A.	Switzerland
RCC, Inc.	Delaware
E. L. Bruce Co., Inc.	Delaware

Opposition

Supreme Court, U.S.
FILED
APR 16 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MAECOM S.A., GENEVA; COOK INTERNATIONAL (NEDERLAND) N.V.; and COOK INDUSTRIES, INC.,

Petitioners,

—against—

ANGLOMAR BULKCARRIERS, LTD.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Were the Courts below correct in deciding that the one year time-bar in the Carriage of Goods by Sea Act, 46 U.S.C. § 1300 *et seq.*, was inapplicable to Respondent's indemnity claim, which was not against the shippers on the bills of lading, but was based on Petitioners' active and primary negligence in managing, coordinating and directing the exportation of the soyabeans which were booked on Respondent's vessel?

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IN THE

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OCTOBER TERM, 1981

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MAECOM S.A., GENEVA; COOK INTERNATIONAL (NEDERLAND) N.V.; and COOK INDUSTRIES, INC.,

Petitioners,

—against—

ANGLOMAR BULKCARRIERS, LTD.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Statement of the Case

On May 22, 1973, Respondent chartered the vessel *Hampton Lion* to Petitioner Maecom to carry soyabeans on a voyage from two ports in Brazil to Antwerp, Belgium. Clause 24 of the charter party provided that "U.S. Clause Paramount [and various other pre-printed clauses] are deemed to be incorporated in this charter party." The Clause Paramount, quoted on page 2 of the Petition, begins with the following language: "This Bill of Lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act . . . " By its terms, the Clause Paramount used here referred only to bills of lading, such as bills of lading issued under the charter party. It did not state that the charter party itself was subject to the United

States Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1300 *et seq.*

Bills of lading were issued for soyabeans loaded on board the *Hampton Lion* at Porto Alegre and Rio Grande, Brazil in June and July of 1973. As required by the incorporation of the Clause Paramount in the charter party, the bills of lading contained the following provision:

> This Short Form Bill of Lading is issued for the shipper's convenience and at their [sic] request, instead of the carrier's regular form of bill of lading. *It* shall have effect subject to the provisions of the U.S. Carriage of Goods by Sea Act 1936 or of the Carriage of Goods by Sea Act or similar Act in force in the locality where the Bill of Lading is issued. [Emphasis added]

When the vessel arrived at Antwerp in August of 1973, the soyabeans were found to be in a damaged condition. Approximately nine months later—and well within the one year limitation period under Belgian law—the cargo receivers brought suit in the Antwerp Commercial Court against the Respondent, who was technically liable for the damage under Belgian law. On December 5, 1977, Respondent sent Petitioner Maecom a telex informing the latter about the cargo receivers' lawsuit and inviting it to assume the defense of that action. On the same day, Respondent filed its Complaint (*See* Appendix to the Petition, at 13a-17a) in the instant action in the Southern District of New York.

The Complaint alleged causes of action for indemnity based on breach of contract, breach of warranty and negligence. Although the first two causes of action were predicated on the charter party, the third cause of action was based on the breach of Petitioners' legal duty to use reasonable care in "receiving, handling, caring for, loading and trimming and discharging the cargo" (*See* Appendix to the Petition, at 16a). This duty arose by operation of law, W. Prosser, *Handbook of the Law of Torts*, at 613 (4th ed. 1971), and was not based or

dependent on the terms and provisions of the charter party. Respondent was obliged to assert at least one cause of action independent of the charter party, since most of the original defendants (including Petitioner Cook International [Nederland] N.V.) were not parties to that contract.* Therefore, the statement on page 2 of the Petition that the charter party was "the sole basis" for the allegations in the Complaint is erroneous. More important, the alleged incorporation of COGSA in the charter party is not relevant to the question of what statute of limitations applied to Respondent's indemnity claims, since one of those claims was not based on the charter party at all.

After a bench trial, the District Court held that Respondent was entitled to indemnity since the cargo damage was primarily caused by the negligent acts and omissions of the Petitioners. The District Court further held that Respondent's claim was not time-barred since *Grace Lines, Inc.* v. *Central Gulf S.S. Corp.*, 416 F.2d 977 (5th Cir. 1969) was "clearly distinguishable" and since Respondent's third cause of action for indemnity was governed by the rule that the cause of action accrues "when the judgment or settlement has been paid" (*See* Appendix to the Petition, at 9a-10a). The Court of Appeals for the Second Circuit affirmed this decision "for the reasons stated in Judge Stewart's thorough opinion" (*See* Appendix to the Petition, at 2a).

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* Petitioner Cook International (Nederland) N.V. was named as "notify party" on all bills of lading; Petitioner Cook Industries, Inc. guaranteed the performance of Petitioner Maecom S.A., Geneva as the charterer named in the charter party.

REASONS FOR DENYING THE WRIT

This case does not present the "special and important reasons" for this Court's review on Writ of Certiorari that are required by Rule 17.1 of the Supreme Court Rules. The decisions of the Courts below are correct on the facts and the law. They do not involve matters of statutory interpretation nor do they conflict with *Grace Lines, Inc.* v. *Central Gulf S.S. Corp.*, *supra*, which is distinguishable on its facts and the law.

Petitioners contend that the decisions of the Courts below vitiated the parties' freedom of contract since those decisions allegedly denied the effect of the U.S. Clause Paramount in the charter party. Although neither the District Court nor the Court of Appeals addressed the question, Petitioners assume that the incorporation of the Clause Paramount made the charter party subject to COGSA and its one year time-bar, 46 U.S.C. § 1303(6). Assuming *arguendo* that the incorporation of the Clause Paramount had this effect, that would not determine what statute of limitations applied to Respondent's third cause of action for indemnity. That cause of action was based on the judicially-established principle that a party required to discharge a claim for which it is only secondarily or constructively liable may seek indemnity from the party primarily liable for the injury giving rise to the claim. *See, e.g.*, *Prickett* v. *Hawkeye-Security Insurance Co.*, 282 F.2d 294 (10th Cir. 1960). Even if COGSA governed the charter party, it did not apply to a cause of action based not on the charter party, but on Petitioners' breach of a duty that arose by operation of law.

The well-established rule regarding the statute of limitations for an ordinary cause of action for indemnity is that the right to indemnity does not accrue until payment is made in the suit for initial liability. The statute of limitations on an action to enforce that right does not begin to run until the indemnitee makes payment. *Barron* v. *United States*, 654 F.2d 644, 650

(9th Cir. 1981); *Marubeni-Iida (America) Inc.* v. *Toko Kaiun Kabushiki Kaisha*, 327 F. Supp. 519, 523 (S.D. Texas 1971).

The District Court applied this rule and correctly held that Respondent's action was timely. The Complaint in this action was filed on December 5, 1977 and the District Court found that the Belgian lawsuit was settled on January 14, 1978, after Petitioners rejected Respondent's tender of the defense of that action. Thus, Respondent's action was timely since the cause of action for indemnity did not accrue until Respondent finalized and consummated its settlement with the Belgian cargo receivers in January 1978.

Petitioners argue that the Court of Appeals should not have affirmed and that the District Court should not have based its decision on the time-bar issue on "rules of common law indemnification," since Respondent pleaded that the Court's subject matter jurisdiction was based on the admiralty and maritime nature of the claim. Petitioners assume that the District Court's reference to "common law indemnification" was an attempt to distinguish between a remedy available at law and a remedy available in admiralty. There is no justification for this assumption. The District Court was obviously referring to "common law" in the sense of judge-made law, as opposed to statutory law or a contractual basis for its decision. The indemnity rule the District Court applied is a well-established principle of admiralty law. For example, in *White* v. *Johns-Mansville Corp.*, 662 F.2d 243 (4th Cir. 1981), the Court wrote at p. 249 as follows:

> This theory of indemnity—that the indemnitor is guilty of active, primary or original fault while the indemnitee is guilty only of passive, secondary or implied fault—is recognized in admiralty. *See, e.g., Tri-State Oil Tool Industries, Inc.* v. *Delta Marine Drilling Co.*, 410 F.2d 178 (5th Cir. 1969).

Likewise, the rule that the statute of limitations on an indemnity claim does not begin to run until the indemnitee makes

payment in the suit for initial liability is also well-established in admiralty law. *Francosteel Corporation* v. *S.S. TIEN CHEUNG*, 375 F. Supp. 794 (S.D.N.Y. 1973); *Marubeni-Iida (America), Inc.* v. *Toko Kaiun Kabushiki Kaisha, supra.*

Contrary to Petitioners' contention, neither the District Court nor the Court of Appeals concluded that the mere presence of the U.S. Clause Paramount made the charter party subject to COGSA. The Second Circuit Court of Appeals recently concluded that the incorporation of the Clause Paramount did not have this effect. In *Nissho-Iwai Co., Ltd.* v. *M/T STOLT LION*, 617 F.2d 907 (2d Cir. 1980) the Clause Paramount in the charter party was similarly worded and the Second Circuit concluded that "no express incorporation of COGSA appears in the present case." 617 F.2d at 914, n.7. Compare *California & Hawaiian Sugar Co.* v. *Columbia S.S. Co., Inc.*, 391 F. Supp. 894 (E.D.La. 1972), where the Clause Paramount at issue provided that "*this charter party* and any bill of lading issued hereunder shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein . . ." [Emphasis added].

Petitioners nevertheless contend that the charter party was subject to COGSA and that *Grace Lines, Inc.* v. *Central Gulf S.S. Co., supra*, required the District Court to dismiss the action as time-barred. However, the District Court carefully considered *Grace Lines* and correctly concluded that it was "clearly distinguishable." The Court of Appeals unanimously affirmed this decision.

In *Grace Lines*, a cargo owner filed suit against the time charterer and the owner of a vessel for cargo damage. The time charterer then cross-claimed against the vessel owner for indemnity on the basis of a breach of the charter party. The District Court dismissed the cargo owner's suit against the vessel owner on the ground that it was time-barred under COGSA. The Fifth Circuit Court of Appeals upheld this decision, but reversed the District Court's holding that the

charterer's indemnity claim over against the vessel owner was not time-barred. The Court of Appeals pointed out that the charterer's cause of action was based on the rights of the cargo claimant, who was clearly subject to COGSA's statute of limitations. Unlike Respondent, the time charterer in *Grace Lines* was not suing on the basis of common law principles of indemnity. Since the time charterer's indemnity action in *Grace Lines* was predicated on the contingent claim of the cargo owner, and the cargo owner's claim against the vessel owner waas time-barred, the *Grace Lines* court held that the charterer's claim for indemnity against the vessel owner was also barred.

The instant case involves an indemnity claim that arose by operation of law, rather than as a result of Petitioners' breach of the charter party. *Grace Lines* has repeatedly been held inapplicable to such an ordinary cause of action for indemnity by courts in and out of the Fifth Circuit. *See, e.g., Francosteel Corporation* v. *S.S. TIEN CHEUNG, supra*; *Marubeni-Iida (America), Inc.* v. *Toko Kaiun Kabushiki Kaisha, supra.* In *Grace Lines*, the cargo interests had a claim against the vessel owner based on COGSA and the charterer's indemnity claim was predicated on the cargo interests' suit, which was time-barred. In the instant case, the Respondent vessel owner's indemnity rights against the Petitioners are based on Respondent's settlement of the timely suit brought by the cargo receivers in Belgium. The District Court similarly found *Grace Lines* to be distinguishable on its facts. Judge Stewart's refusal to apply a case he found "clearly distinguishable" does not create the purported conflict between the Second and Fifth Circuits on which Petitioners pin their hopes for the issuance of a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that a Writ of Certiorari should not issue to review the decision below. The trial judge and a unanimous Court of Appeals panel have already carefully considered and rejected the same arguments raised again here in this ordinary commercial dispute.

Respectfully submitted,

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